

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VS.

AND

AND

Docket No. 183,091

ORDER

The application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey dated September 19, 1994, came on for oral argument.

APPEARANCES

Claimant appeared by and through his attorney Jan L. Fisher of Topeka, Kansas. Respondent and its insurance carrier appeared by and through their attorney William L. Townsley III of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney John C. Nodgaard of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) What, if any, is the nature and extent of claimant's injury and/or disability?
- (2) What was the average weekly wage of claimant on the date of injury and should claimant's fringe benefits be included in the average weekly wage for purposes of an award?
- (3) What, if any, is the liability of the Kansas Workers Compensation Fund?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, a 59-year-old crane operator, had been operating cranes for 33 years with approximately 20 of those years spent working at various times for respondent. The operation of the type of crane run by claimant required repetitious pushing and pulling of controls; constant alertness regarding people over, under and around the crane; and was a physically demanding job involving repetitive activities to claimant's upper extremities and to his cervical spine.

On February 13, 1992, claimant was running the crane at a microwave tower and a heavy steel support wire broke. These heavy cables, being three-quarter-inch steel, can be very dangerous and, upon hearing that the wire had broken, the claimant, along with the other workers at the job site, turned and ran from the tower. While running, claimant tripped and fell, landing on his arm, elbow and wrist, and also injuring his shoulder and neck, all on his right side. Claimant advised Gordon Miller, his superintendent, and Charlie Holmes, his state supervisor of the problems. Claimant thought the pain would go away and did not immediately seek medical treatment. He did, however, after a period of time go to a chiropractor, a Dr. Mark Hatesohl, but received little or no relief from the treatments.

Because of the claimant's job responsibilities and heavy travel schedule and also due to his wife's illness, which necessitated that he continue working in order to maintain their health insurance, claimant was unable to miss work for any extended period of time in the spring of 1992 and, as a result, any improvement obtained by any short periods of treatment were negated by claimant's return to work and subsequent increase in symptomatology. Since the date of injury, claimant's condition has gotten progressively worse. He developed increased pain and a more limited range of motion in his cervical spine. The inability to look up for long periods of time has severely inhibited his ability to run the cranes for respondent. Claimant's condition progressed to the point where he felt significant concern for the safety of his fellow workers when he was operating the crane. He elected to take himself out of the labor market due both to these safety concerns and his ongoing pain and discomfort.

In the Award, the Special Administrative Law Judge found that claimant retained the ability to perform the job he was doing for respondent at the time of the injury but then proceeded to award claimant a work disability. The Appeals Board finds, based upon the testimony of the claimant and the medical restrictions placed upon him by Dr. P. Brent Koprivica, that claimant is incapable of performing the crane operator's job safely for any extended period of time.

K.S.A. 44-501 and K.S.A. 44-508(g) make it the claimant's burden of proof to establish the claimant's right to an award of compensation by proving the various conditions upon which the claimant's right depends by a preponderance of the credible evidence; see also Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

K.S.A. 1991 Supp. 44-510e(a) states in part:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than the percentage of functional impairment."

Claimant was examined and/or treated by several doctors after his injury. Dr. Mark Hatesohl, a chiropractor, first saw claimant June 25, 1992. Claimant described the injury to his wrist, shoulder and neck following the February 1992 injury with the description of the injury being consistent with claimant's later testimony. After undergoing several months of intermittent chiropractic treatment around his ongoing work schedule, claimant was referred to an orthopedic surgeon in January 1993. At that time, the insurance deauthorized Dr. Hatesohl. The only really significant period of treatment from Dr. Hatesohl occurred between December 21 and December 31, 1993. Dr. Hatesohl saw claimant approximately eight times during that eleven-day period, with the treatment providing no improvement to claimant.

Claimant was also examined by Dr. Koprivica who, after multiple tests, diagnosed cervical pain with degenerative disease of the cervical spine. After reviewing certain medical reports, he noted claimant had a preexisting medical condition and felt the accident described by claimant clearly aggravated claimant's preexisting condition. He assessed claimant functional impairment for injuries suffered to his neck, right shoulder, right upper extremity and right wrist. In combining the above impairments using the Combined Values Chart contained in the American Medical Association Guides to the Evaluation of Permanent Impairment, 3rd Edition, (Revised), Dr. Koprivica assessed claimant a 33 percent whole person impairment resulting from the February 13, 1992 injuries.

Claimant also underwent an independent medical examination with Dr. Ernest Schlachter at the order of Judge Clark. The history provided to Dr. Schlachter at the December 28, 1993 examination was consistent with claimant's history of injury throughout this matter. Dr. Schlachter provided substantial tests, ultimately diagnosing narrowing at C5-6, C6-7 with degenerative changes throughout the cervical spine. He found cervical arthritis, chronic tendinitis and a partially frozen shoulder with an aggravation of a preexisting degenerative arthritic change in the claimant's right wrist. He assessed a functional impairment to claimant which, when combined, equated to an 11 percent permanent partial impairment to the body as a whole. Dr. Schlachter felt claimant suffered no permanent aggravation to the cervical spine as a result of the February 13, 1992 incident. He found that the problems associated with the cervical spine stemmed either from the normal aging process or from degenerative arthritic changes which were already present in claimant's cervical spine. He returned claimant to work with permanent restrictions of no lifting over 35 pounds with the right arm, no working above horizontal with the right arm and no repetitive lifting with the right arm in excess of 24 pounds, but he found that claimant could return to work and operate a crane safely. At the time of Dr. Schlachter's examination claimant continued to work for respondent operating a crane; although, according to the claimant's testimony, this was done while experiencing significant amounts of pain and limitation of motion. The testimony of Dr. Schlachter indicated that he felt claimant was a symptom magnifier because of the problems encountered by Dr. Schlachter during the examination of claimant's cervical spine. Claimant, on the other hand, alleged that Dr. Schlachter did not provide a thorough exam,

which claimant referred to as a "joke" and felt Dr. Schlachter did not act as a professional during the examination. It is fairly clear from the record that any doctor/patient relationship developed between Dr. Schlachter and the claimant was less than satisfactory in this case.

Claimant was also examined and treated by Dr. Toby, although Dr. Toby's deposition was never taken in this matter. Both Dr. Koprivica and Dr. Schlachter had the opportunity to review Dr. Toby's medical reports, with these reports being discussed at length in the record without objection. Dr. Toby's medical reports indicate claimant suffered a temporary aggravation of his preexisting condition; although, Dr. Toby's examination of claimant in September 1993 following a February 1992 injury, would indicate medically this was more than a temporary aggravation. Dr. Toby assessed claimant an 8 percent whole body functional impairment as a result of the injury suffered on February 13, 1992.

It is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

In reviewing the various functional impairment ratings provided by the doctors, the Appeals Board finds it's significant that both Dr. Toby and Dr. Koprivica appeared to develop a satisfactory doctor/patient relationship with the claimant while Dr. Schlachter, on the other hand, appeared to develop significant disputes with the claimant during the examination. The Appeals Board finds the medical reports of Dr. Koprivica and of Dr. Toby to be more credible than those of Dr. Schlachter. In assessing claimant's functional impairment, the Appeals Board considers both the 33 percent whole body functional impairment of Dr. Koprivica and the 8 percent whole body functional impairment of Dr. Toby in finding that claimant has a 20.5 percent functional impairment as a result of the injury suffered with respondent through claimant's last date of employment. The evidence indicates that claimant worked with respondent and did perform his normal job duties through the end of July 1994.

Claimant was referred to Ms. Karen Terrill and Mr. Dick Santner for an evaluation of his loss of access to the open labor market and loss of ability to earn comparable wage. When claimant was examined by Ms. Terrill on May 27, 1994, he had been working for respondent at his regular job at a comparable rate of pay. Ms. Terrill found claimant to have suffered no loss of ability to earn a comparable wage as he was suffering no wage loss at the time of her evaluation. Ms. Terrill also found that based upon Dr. Koprivica's restrictions, claimant had suffered a 78 percent loss of access to the open labor market in the United States and a 76 percent loss of access in Shawnee County, Kansas. The Appeals Board finds the labor market prong of Ms. Terrill's evaluation to be appropriate and to be supported by the evidence. The Appeals Board further finds the zero percent loss of ability to earn a comparable wage found by Ms. Terrill to be inappropriate in this matter as Ms. Terrill had not been provided sufficient evidence upon which to render an accurate opinion subsequent to claimant's termination of employment with respondent.

Claimant was also examined by Mr. Dick Santner on February 22, 1994. In evaluating the restrictions placed on claimant by Dr. Koprivica, he found claimant had lost 90 percent of his ability to perform work in the open labor market. When considering the restrictions of Dr. Toby, he found claimant had lost 32 percent of his ability to perform work in the open labor market which, when combined, equates to a 61 percent loss of access to the open labor market. In determining the extent of permanent partial disability, both the reduction of claimant's ability to perform work in the open labor and ability to earn comparable wages must be considered. While a balancing of the two factors is required, the statute does not specifically state what emphasis is to be placed upon each of the tests. See Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

In evaluating the evidence presented, the Appeals Board finds the testimony of Karen Terrill and Dick Santner regarding claimant's loss of access to the open labor market should be considered. In evaluating and comparing the two, the Appeals Board finds no legitimate reason to place greater emphasis upon the opinion of Ms. Terrill over that of Mr. Santner or vice versa. The Appeals Board finds claimant has suffered a 68.5 percent loss of access to the open labor market as a result of the injuries suffered on February 13, 1992.

Having earlier rejected the opinion of Karen Terrill regarding the claimant's loss of wage-earning capacity, the Appeals Board now turns to the opinion of Mr. Santner. Mr. Santner found claimant to be capable of earning \$5.00 per hour working a 40-hour week which equates to \$200.00 per week. Mr. Santner then compared this with an average weekly wage of \$863.33 which he found to be claimant's average weekly wage on the date injury. This equates to a wage loss of 77 percent.

In reviewing the average weekly wage information presented, the Appeals Board finds claimant, on the date of injury, was earning \$15.32 per hour times 40 hours per week for a base wage of \$612.80. Claimant earned \$2,317.15 in overtime for the 26 weeks preceding the accident which averages to \$89.12 per week, for an average weekly wage of \$701.92 through claimant's last date of employment. Claimant's fringe benefits over the 26 weeks preceding the accident equated to \$4,664.00 which equals \$179.34 per week. This amount, combined with claimant's average weekly wage before termination of employment equates to an average weekly wage of \$881.31 per week. In comparing claimant's postinjury ability to earn comparable wages of \$200.00 to claimant's average weekly found by the Board to be \$881.31, the Appeals Board finds claimant has suffered a loss of ability to earn comparable wages of 77 percent.

Turning again to the logic in Hughes, the Appeals Board finds no reason to place greater emphasis upon claimant's loss of access to the open labor market over his loss of ability to earn a comparable wage. In comparing the two, the Appeals Board finds claimant has suffered a 73 percent permanent partial general body work disability as a result of the injury suffered on February 13, 1992, with the work disability to begin August 1, 1994, subsequent to claimant's termination of employment with respondent.

With regard to the liability of the Kansas Workers Compensation Fund, it is acknowledged that claimant suffered from preexisting physical impairments. In order for an employer to be relieved of liability, either wholly or partially, from the Workers Compensation Fund, it is the employer's responsibility and burden to show that it knowingly hired or retained a handicapped employee after acquiring knowledge of a preexisting impairment. K.S.A. 44-567(b).

The purpose of the Workers Compensation Fund is to encourage employment of persons handicapped as a result of specific impairments by relieving employers, wholly or partially, of Workers Compensation liability resulting from compensable accidents suffered by these employees. K.S.A. 44-567(a); Blevins v. Buildex, Inc., 219 Kan. 485, 548 P.2d 765 (1976).

In this instance, the Appeals Board is not persuaded that respondent has met its burden of proving that it knowingly retained a handicapped employee within the definition contained in K.S.A. 1991 Supp. 44-566(b). The Appeals Board further finds that respondent's knowledge of claimant's preexisting impairment is not sufficient to satisfy the requirements of K.S.A. 44-567(b) that the respondent retained claimant as a handicapped employee after acquiring knowledge of claimant's preexisting impairment. As such, any liability against the Kansas Workers Compensation Fund must be denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated September 19, 1994 be affirmed in part and modified in part in that the claimant, Marion Foveaux, is hereby

awarded compensation against the respondent, Costelow Company, Inc., and its insurance carrier, Travelers Insurance Company, for accidental injury occurring on February 13, 1992, and based upon an average weekly wage of \$701.92 through claimant's last day worked and thereafter based upon an average weekly wage of \$881.31 for 18 weeks temporary total disability compensation at the rate of \$289.00 per week in the sum of \$5,202.00 followed thereafter by 110.43 weeks permanent partial disability at the rate of \$95.93 per week, totaling \$10,593.55, followed thereafter by permanent partial general body compensation at the rate of \$289.00 week for a total award not to exceed \$100,000.

As of January 30, 1996, claimant would be due and owing 18 weeks temporary total disability compensation at the rate of \$289.00 per week in the sum of \$5,202.00, followed by 110.43 weeks permanent partial disability at the rate of \$95.93 per week, totaling \$10,593.55, followed by 78.28 weeks permanent partial general body work disability at the rate of \$289.00 per week, totaling \$22,622.92 for a total amount due and owing of \$38,418.47, which is due in one lump sum minus any amounts previously paid. Thereafter, the remainder of the award shall be paid at the rate of \$289.00 per week until fully paid or until further order of the Director, for a total award not to exceed \$100,000.00. Claimant's compensation through August 1, 1994 is based upon an average weekly wage of \$701.92 and a functional impairment rating of 20.5%. Claimant's compensation after August 1, 1994, is based upon an average weekly wage of \$881.31 and based upon a permanent partial general body work disability of 73%.

Further award is made that claimant shall be entitled to future medical benefits upon application to and approval by the Director.

Unauthorized medical expenses of up to \$350.00 are ordered paid on behalf of the claimant upon presentation of an itemized statement verifying same.

All compensation, medical expenses and costs are due to be borne by the respondent and not by the Kansas Workers Compensation Fund, with the Workers Compensation Fund being responsible for its own attorney fees.

Claimant's attorney fee contract is hereby approved insofar as it is consistent with K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Kansas Workers Compensation Act are hereby assessed to the respondent and its insurance carrier to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Deposition Services Transcript of Regular Hearing	\$440.70
Gene Dolginoff Associates Deposition of P. Brent Koprivica, M.D.	\$606.50
Owens, Brake & Associates Deposition of Mark J. Hatesohl, D.C.	\$267.30
Appino & Biggs Reporting Service Deposition of Franklin D. Mueller Deposition of Dick Santner	Unknown \$293.80
Kelley, York & Associates Deposition of Karen Crist Terrill Deposition of Ernest R. Schlachter, M.D.	\$298.46 \$561.01

Nora Lyon & Associates	
Deposition of Janine Mohan	\$ 54.20
Deposition of Gordon Miller	\$ 63.70

IT IS SO ORDERED.

Dated this ____ day of February 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Topeka, KS
William L. Townsley III, Wichita, KS
John C. Nodgaard, Wichita, KS
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director